

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEEFE MIDDLETON, JR.,

Defendant-Appellant.

UNPUBLISHED

May 12, 2005

No. 253689

St. Clair Circuit Court

LC No. 03-002055-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALLEN MIDDLETON,

Defendant-Appellant.

No. 253690

St. Clair Circuit Court

LC No. 03-002056-FH

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Following a joint jury trial, defendant Brian Keefe Middleton, Jr., was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and aggravated assault, MCL 750.81a, and defendant Jeffrey Allen Middleton was convicted of assault with intent to do great bodily harm less than murder, and assault and battery, MCL 750.81. Defendant Brian Middleton was sentenced to concurrent prison terms of four to ten years for the assault with intent to do great bodily harm conviction, and one year for the aggravated assault conviction. Defendant Jeffrey Middleton was sentenced to concurrent prison terms of 23 to 120 months for the assault with intent to do great bodily harm conviction, and ninety-three days for the assault and battery conviction. Both defendants appeal as of right and their appeals have been consolidated for this Court's consideration. We affirm.

I

Defendant Brian Middleton first challenges the trial court's decision to allow a witness to testify that she was nervous about testifying because she had been threatened by persons in

defendant's gang. We review the trial court's decision for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant maintains that the trial court should not have permitted the witness to explain why she was reluctant to testify because it was not relevant. We disagree. Given the witness' admitted nervousness and soft-spoken manner,¹ evidence explaining why the witness was reluctant to testify was relevant to her credibility and motivation to testify. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995).

Defendant also claims that he was prejudiced because the jury was led to believe that he was connected to the alleged threats against the witness. We again disagree. The witness twice denied that either of the defendants had threatened her. When the prosecutor attempted to discern who threatened her, defense counsel objected. The trial court sustained the objection on the ground that the answer would constitute hearsay. If the trial court had allowed the prosecutor to more fully explore the origin of the threats against the witness, the prosecutor may have properly been able to use the threats to demonstrate defendant's consciousness of guilt. *People v Salsbury*, 134 Mich 537, 569-570; 96 NW 936 (1903); see also *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Here, however, the trial court's decision benefited defendant. The witness twice stated that defendant had not threatened her. The fact that defense counsel successfully cut off further exploration of this issue was prejudicial to the prosecutor, not defendant.

Defendant's related claim that the witness' testimony should not have been admitted because it improperly revealed defendant's gang involvement is without merit. Evidence of defendant's gang involvement was central to the prosecutor's theory that the victims were assaulted because one of the victims was wearing a red bandana sporting the gang's colors. Without this evidence of motive, the beating would appear inexplicable. Thus, the evidence of defendant's gang membership was relevant. See *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995).

II

Defendant Brian Middleton next argues that the trial court improperly admitted various statements made by nontestifying codefendants. He maintains that the admission of these statements violated his right of confrontation as explained in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 177 (2004). Because defendant did not object to the statements at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The record reflects that the trial court repeatedly instructed the jury that statements made by a codefendant could only be considered against that codefendant and not against others. The jury is presumed to follow the court's instructions. *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002). Therefore, defendant has not shown a plain error affecting his substantial

¹ Several times during the witness' testimony, defense counsel requested that the witness speak louder.

rights. We also reject defendant's related claim that defense counsel was ineffective for not objecting to the statements. In light of the trial court's repeated instructions that the statements were only to be considered against the person who made them, defense counsel was not ineffective for failing to object.

III

Defendant Brian Middleton next argues that the trial court erroneously allowed the late endorsement of a prosecution witness, James Robinson.

MCL 767.40a(3) requires that the prosecutor provide the defendant with a list of the witnesses the prosecutor intends to produce at trial not less than thirty days before trial. However, MCL 767.40a(4) allows the prosecutor to add or delete from the witness list at any time upon leave of the court for good cause shown. We review the trial court's decision for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

The witness, Robinson, pleaded guilty to his involvement in the matter during defendant's trial. There was good cause for Robinson's late endorsement because the prosecutor could not have called Robinson as a witness before he entered his guilty plea. See *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986); *People v Clark*, 172 Mich App 407, 415; 432 NW2d 726 (1988). Further, Robinson's identity was known to defendant before trial, and copies of Robinson's police interviews were made available to defendant before trial. With regard to defendant's claim that he was prevented from countering Robinson's allegations because a witness who previously stated that defendant did not have a weapon was already dismissed, we note that the trial court permitted defense counsel to introduce relevant portions of the dismissed witness' preliminary examination testimony. Under the circumstances, defendant has not shown that the trial court abused its discretion in allowing the late endorsement of the witness.

IV

Next, defendant Brian Middleton argues that he was denied a fair trial because of the cumulative effect of several errors. However, only actual errors may be aggregated to establish a claim of cumulative error requiring reversal. *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002). As noted above, defendant has failed to establish any individual errors prejudicing his trial; consequently, his claim of cumulative error fails.

V

Defendant Brian Middleton last argues that he is entitled to resentencing because the trial court increased his statutory sentencing guidelines range on the basis of facts not found by the jury, contrary to *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court stated that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. This Court has held that *Claypool* is binding precedent on this point. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd __ Mich __; 693 NW2d 823 (3/31/2005). We similarly conclude that the United States Supreme Court's recent decision in *United States v Booker*, __ US __; 125 S Ct 738; 160 L Ed 2d 621 (2005), is also inapplicable. Like the sentencing scheme in *Blakely*, *Booker* dealt with the application of the

federal sentencing guidelines to a determinate sentencing scheme. Both are distinguishable from Michigan's indeterminate sentencing scheme. Compare *McMillan v Pennsylvania*, 477 US 79, 81; 91 L Ed 2d 67; 106 S Ct 2411 (1986) (finding no Sixth Amendment violation as applied to Pennsylvania's indeterminate sentencing scheme). Therefore, defendant is not entitled to resentencing.

VI

Defendant Jeffrey Middleton argues that the trial court erred when it failed to instruct the jury on the proper order of deliberations with respect to its consideration of lesser included offenses. See *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982); CJI2d 3.11(5). With the exception of the court's instruction on flight, however, defense counsel stipulated to the form and content of the jury instructions. Therefore, this issue was affirmatively waived, and any claim of error was extinguished. *People v Carter*, 462 Mich 206, 215-216, 219; 612 NW2d 144 (2000).

VII

Lastly, defendant Jeffrey Middleton argues that the trial court erroneously scored offense variables 1, 2, and 7 of the sentencing guidelines. We disagree. The trial court did not error in its scoring of OV 1 (aggravated use of a weapon) and OV 2 (lethal potential of the weapon possessed) where it was established that a codefendant possessed a weapon during the assaults and that the codefendant appropriately received scores of ten points and one point for OV 1 and OV 3, respectively. MCL 777.31(2)(b); MCL 777.32(2). Further, the trial court's scoring of fifty points for OV 7 (aggravated physical abuse) was supported by the trial testimony describing the extensive, brutal assaults on the two victims. MCL 777.37(1)(a); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We affirm.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

/s/ Michael J. Talbot